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SURVIVAL OF ACTIONS.

(*Continued from page* 364.)

Statutory changes in the United States.—Various statutes have been passed in this country whose object is to reverse the common-law rule, and to allow the right of action to survive, and be prosecuted by or against an executor or administrator. It has not been the purpose however to include all classes of actions in this alteration of the old law; for in some instances certain kinds of actions have been expressly excepted therefrom. In addition to this the courts have so construed others of the enabling statutes as not to include very many kinds of actions which might appear at first blush to be within the provisions of the statutes. Thus in states where these statutes are in force it has been laid down that the following classes of cases are not within their terms: viz.: actions for libel: *Walters* v. *Nettleton*, 5 Cush. 544; *Cummings* v. *Bird*, 115 Mass. 346; for malicious prosecution: *Nettleton* v. *Dinehart*, 5 Cush. 543; *Conly* v. *Conly*, 121 Mass. 550; for fraudulent representations whereby a party was induced to part with his real estate: *Leggate* v. *Moulton*, 115 Mass. 552; for fraudulently recommending a person as in good credit whereby one is induced to sell him goods on credit and lose their price: *Read* v. *Hatch*, 19 Pick. 47; *Zabriskie* v. *Smith*, 13 N. Y. 322; for fraud and deceit in selling damaged corn which the plaintiff fed to his horses whereby they died: *Cutting* v. *Tower*, 14 Gray 183; for making false answers in an examination under a trustee process: *Stillman* v. *Hollenbeck*, 4 Allen 391; for breach of promise of marriage: *Smith* v. *Sherman*, 4 Cush. 408; *Wade* v. *Kalbfleisch*,

58 N. Y. 282; an action by a guest for injuries received through the negligence of the landlord: *Stanley* v. *Vogel*, 9 Mo. (App.) 100. A proceeding against a stockholder of a corporation under the Massachusetts statute for a debt of the corporation does not survive the death of the stockholder, and the executor cannot be made a party to such a proceeding: *Dane* v. *Dane Manufacturing Co.*, 14 Gray 488.

Construction of "Trespass" in the Statutes.—The New Jersey statute on the subject saves from abatement by death actions of "trespass to the person or property real or personal." The word "trespass" as used in this statute is not restricted to torts remediable by the action of trespass, but is extended by judicial construction to mean "tort," or wrong, as in the English statute—and therefore the effect of this statute is to give a right of action against the representatives of a deceased wrongdoer for any injurious act of a suable nature, without regard to the form in which the remedy is sought. An action to recover damages caused by water being flowed back upon the plaintiff's land from the mill dam of the defendant: *Ten Eyck* v. *Runk*, 2 Vroom 428; an action against an attorney at law for negligence and deceit in the discharge of his duty: *Tichenor* v. *Hayes*, 12 Vroom 193; an action for injury or neglect by a physician, Id., survive under this statute. But not an action for a breach of promise of marriage, for that is founded on contract and not in tort. A similar provision is found in a New York statute, and a similar liberal construction is given to it by the courts of that state. An action for carelessly and negligently setting fire to and burning up grass and fences and hay stacked upon a farm is a "trespass" within the New York statute: *Fried* v. *New York, &c., Railroad Co.*, 25 How. Pr. 287. An action of deceit by a woman by which she is led into a void marriage is an action of "trespass on the case" within the Maine statute: *Withee* v. *Brooks*, 65 Me. 18; but an action of breach of promise of marriage is not: *Hovey* v. *Page*, 55 Me. 142. And under a similar statute in Rhode Island it was held that an action on the case for unlawfully erecting a large stable so near a hotel as to become a nuisance thereto would survive: *Aldrich* v. *Howard*, 8 R. I. 125. An action against a town for a personal injury caused by a defect in its highway is an action of "trespass on the case" within the Maine statute: *Hooper* v.

Gorham, 45 Me. 212; and so is an action for a libel: *Nutting* v. *Goodridge*, 46 Me. 82.

The Massachusetts Statute.—The Massachusetts statute (1842, c. 89, sect. 1) declares that "the action of trespass on the case for damage to the person shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator in the same manner as if he were living." The Revision of 1882 recites the actions which survive as follows: "In addition to the actions which survive by the common law, the following shall also survive: actions of replevin; of tort for assault; battery; imprisonment or other damage to the person; for goods taken and carried away or converted by defendant to his own use; or for damage done to real or personal estate; and actions against sheriffs for malfeasance or nonfeasance of themselves or their deputies." This statute is specially mentioned as one where the causes of action which are to survive the death of the party are expressly enacted by the legislature.

Where death is instantaneous action does not survive.—Such statute, it is held, supposes the party deceased to have been once entitled to bring an action for the injury, and either to have commenced the action and subsequently died, or being entitled to bring it to have died before exercising that right. Therefore where the casualty relied on as the cause of action and the death of the party injured are simultaneous, the right of action does not survive: *Kearney* v. *Boston, &c., Railroad Co.*, 9 Cush. 108; *Mann* v. *Same*, Id. 108; *Louisville, &c., Canal Co.* v. *Murphy*, 9 Bush 522. In *Kearney* v. *Boston, &c., Railroad Co.*, 9 Cush. 108, the plaintiff's intestate was riding in a wagon across a highway, when the wagon was struck by the cars and he was instantly killed. It was held that the action could not be maintained. "The cause of action," said SHAW, C. J., "must accrue during the lifetime of the party injured. Here there was no time during the life of the intestate at which a cause of action could accrue, because the life closed with the accident from which a cause of action would otherwise have accrued." The same result was reached where a girl five years old fell from a bridge into a river below and was drowned: *Louisville, &c., Canal Co.* v. *Murphy*, 9 Bush 522.

But actual life or death is the test: the accruing of the right of action does not depend upon intelligence, consciousness or men-

tal capacity of any kind on the part of the sufferer, or on the length of time he lives. In one case it appeared that a woman run over by a train and killed did not speak after the accident, though a witness saw her move her hands and feet slightly and breathe only once. The court finding that this was only a momentary, spasmodic struggle, and that the death was instantaneous, refused a recovery: *Mann* v. *Boston, &c., Railroad Co.*, 9 Cush. 108. In another, a woman killed in a similar manner, lived from ten to twenty hours after the accident, during which time she breathed, swallowed and uttered sounds, and manifested signs of life. Here the action was held to survive: *Hollenbeck* v. *Berkshire Railroad Co.*, 9 Cush. 479. In another, a man struck by a locomotive lived for fifteen minutes, though insensible all the time. Here also the action survived: *Bancroft* v. *Boston, &c., Railroad Co.*, 11 Allen 34. "Time," said the court, "cannot be the test by which the right of the personal representative to sue can be tried; nor can the absence or presence of consciousness or sensibility be the standard. We are brought back therefore to the only rule which can be practically applied, and that is, if the party injured lives after an accident the right to sue accrues and survives." In Kentucky, a druggist's clerk made a mistake in putting up a prescription, whereby the plaintiff's intestate, who took it according to directions, "died the same day, after enduring great suffering and agony." The action against the druggist survived: *Hansford* v. *Payne*, 11 Bush 380. But in Tennessee, on the other hand, it is held that the statute of that state makes no distinction between the cases where the injured party lives a time and where the death is instantaneous. The cause of action accrues at the date of the injury, and is the same whether brought by him during life or by his personal representative after death: *Fowlkes* v. *Nashville, &c., Railroad Co.*, 9 Heisk. 829; *Collins* v. *East Tennessee, &c., Railroad Co.*, Id. 841.

What actions survive as "Damages to the Person."—The words "damages to the person" in the Massachusetts statute are construed to include every action the substantial cause of which is a bodily injury, whether the connection between the cause and effect is so close as to support an action of trespass or so indirect as to require an action on the case at common law. Therefore they include an action against C. for selling a medicine to B., to be administered to A., from which A. dies: *Norton* v. *Sewall*, 106

Mass. 143. They therefore include actions against railroad companies for negligent personal injuries: *Kearney* v. *Boston, &c., Railroad Co.*, 9 Cush. 108; *Mann* v. *Same*, Id. 108; *Hollenbeck* v. *Berkshire Railroad Co.*, Id. 479; *Bancroft* v. *Boston, &c., Railroad Co.*, 11 Allen 34; and against municipal corporations for injuries to the person caused by defects in the highway: *Demond* v. *City of Boston*, 7 Gray 544.

What actions do not survive as Damage to the Person.—On the other hand these words do not extend to torts not directly affecting the person, but only the feelings or reputation or causing damages not of a physical character, such as libel: *Walters* v. *Nettleton*, 5 Cush. 544; *Cummings* v. *Bird*, 115 Mass. 346; malicious prosecution: *Nettleton* v. *Dinehart*, 5 Cush. 543; breach of promise of marriage: *Smith* v. *Sherman*, 4 Cush. 408.

Damage done to "Real or Personal Estate."—Among the actions which by the Massachusetts statute are said to survive are actions for damages done to real or personal estate. Construing these words the court of that state held that the causes of action which survive by virtue of this phrase, are those the effect of which has been to occasion injury to some specific property either personal or real which belonged to the deceased. They do not include injuries to his estate generally or a mere fraud or cheat by which he sustains a pecuniary loss. In *Cummings* v. *Bird*, 115 Mass. 346, the plaintiff brought an action of libel, alleging that he had lost a lucrative situation by reason of its publication. Before judgment the plaintiff died, and his administratrix asked to be allowed to continue the suit as for damage done to his estate by the publication of the libel. But it was held that the action did not survive. In *Leggate* v. *Moulton*, 115 Mass. 552, it was held that an action for fraudulent representations by means of which a person was induced to part with his real estate did not survive the death of the plaintiff under this statute. "It is argued," said DEVENS, J., "that within the meaning of the statute this is a damage done to the estate of the intestate, because she was induced by the fraud of the defendant to convey it to one who unjustly deprived her of the payment therefor. The statute was however intended to give a remedy which should survive, only for injuries of a specific character to real or personal estate, and not to include actions for damages for frauds committed upon the intestate by which she might have been induced

to part with her property at less than its value or so to conduct herself on account of the confidence reposed by her in the party thus deceiving her as to diminish her property. The gist of the action is the fraud; the real estate has sustained no damage or injury; but the fraud of the defendant induced the intestate to part with it under circumstances which prevented her from receiving its value." The same conclusion had been reached in the earlier case of *Read* v. *Hatch*, 19 Pick. 47, where the defendant, in an action for fraudulently recommending a person as in good credit whereby the plaintiff was induced to sell him goods on credit and thereby sustained damage, died before judgment. So this section has been held to include only those cases where injury is occasioned to property by the direct wrongful act of a party, and not where it results incidentally or collaterally therefrom or from the doing of some other act or the happening of some subsequent event over which the wrongdoer had no control. In *Cutting* v. *Tower*, 14 Gray 183, the action was for fraud and deceit in selling to the plaintiff's intestate damaged corn, which caused the death of his horses when given to them as food. It was held that the action did not survive. "The gist of the action in the present case," said BIGELOW, J., "is the fraud and deceit practised by the defendants on the plaintiff's intestate in the sale of merchandise. For this an action to recover damages would have laid in his favor whether the meal which he purchased had ever been used or not; it was not therefore the fraudulent representation of the defendants which operated directly to the injury of any personal property. It was the use to which the meal was put that caused the damage for which the plaintiff now seeks to recover. But that was not the act of the defendants. It was only a pecuniary loss resulting incidentally from the sale of the meal. Suppose the meal instead of being used by the plaintiff's intestate to feed his horses had been made into bread for his family, and caused great sickness and suffering and loss of time to him and others, it would hardly be said that an action in such case would survive for damage to the person."

But they do include injuries to specific property, the natural consequences of the tort. Therefore an action of tort against a mill-owner who obstructs the flow of water in a stream by maintaining his dam at too great a height, to the injury of another mill-owner, survives the death of the defendant: *Brown* v. *Dean*, 123 Mass. 254. So, also, they include actions to recover specific property obtained by

fraud. In *Cheney* v. *Gleason*, 125 Mass. 166, the owner of a piece of land employed a broker to sell it for him who by fraudulent representations concerning the value of another parcel of land induced him to make a conveyance of his land to a third person, also a party to the fraud, and to take in exchange the parcel concerning which the representations were made; this third person afterwards conveyed the land to a purchaser in good faith, and took a mortgage to secure a part of the purchase-money. The party defrauded filed a bill to obtain an assignment of the mortgage and damages, but afterwards died. It was held that the action survived to his executor. "This is not," said the court, "an action to recover damages for a simple fraud practised upon the testator by which he was induced to part with his property at less than its value. It is a suit to recover in equity specific property or the avails of specific property still held by one or more of the defendants, parties to the original fraud, and which was obtained from the plaintiff in the abuse of a trust arising out of an existing confidential relation between him and one of the defendants as well as damages for the breach of the trust. The liability of a trustee in equity for a breach of duty causing damage is not terminated by the death of the party wronged."

Other Statutory Provisions and their Construction.—Under the New York statute it is held that an action by a husband against a carrier of passengers to recover for the loss of services of his wife and for expenses paid in consequence of injuries to her person while she was a passenger, though an action for tort, survives by virtue of the provision preserving from abatement actions "for wrongs done to the property, rights or interests of another," and is not within the exception as to "actions on the case for injuries to the person of the plaintiff:" *Cregin* v. *Brooklyn, &c., Railroad Co.*, 75 N. Y. 192. But an action for seduction is within this exception: *Holliday* v. *Parker*, 23 Hun 71; and so, as we have seen, an action for breach of promise of marriage.

An action against a vendor of land for fraudulent representations as to an incumbrance is within the New York statute: *Haight* v. *Hayt*, 19 N. Y. 464; as is an action for fraudulent representations inducing the purchase of stock: *Bond* v. *Smith*, 4 Hun 48. But an action for breach of promise of marriage is not an action "for wrongs done to property, rights or interests," within the New York statute: *Wade* v. *Kalbfleisch*, 58 N. Y. 282.

The Pennsylvania statute which allows to survive "all personal actions which the decedent * * might have commenced and prosecuted, except actions for slander, for libels and for wrongs done to the person," includes an action for trespass for mesne profits: *Arundel* v. *Springer*, 71 Penn. St. 398.

In Kentucky: "No right of action for personal injury or injury to real or personal estate shall cease or die with the person injuring or the person injured, except actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted an action may be brought or revived by the personal representative or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract:" Gen. Stats. Ky. 1873, cap. 10, p. 179. An action for instigating and procuring the unlawful arrest of a person survives under this statute after his death: *Huggins* v. *Toler*, 1 Bush 192.

Under the Vermont statute an action for a "bodily hurt or injury," survives. These words include, it is held, an action to recover damages for an unlawful arrest and imprisonment: *Whitcomb* v. *Cook*, 38 Vt. 477. An action for the value of cattle killed by a trespasser survives under the Texas statute: *Ferrill* v. *Mooney*, 33 Tex. 219; and under the Ohio statute an action for slander does not abate by the death of the plaintiff during the pendency of the suit: *Alpin* v. *Morton*, 21 Ohio St. 536. Under the Missouri statute (Rev. Stats. sect. 96, 97), actions "for all wrongs done to the property, rights or interest of another * * except actions for slander, libel, assault and battery or false imprisonment, or actions on the case for injuries to the person," survive. An action by a father against a common carrier for causing the death of his son: *James* v. *Christy*, 18 Mo. 162; by a woman fraudulently induced to marry a man already married, for the value of her services while living with him as his wife: *Higgins* v. *Breen*, 9 Mo. 497, are held to survive under this statute. But an action by a guest against a hotel-keeper for injuries received through an unguarded opening in the hotel is held not to sound in contract and not to survive: *Stanley* v. *Vogel*, 9 Mo. (App.) 100.

The Iowa statute of 1851 provided that no actions should abate by death if, "from the nature of the case, the cause of action can survive or continue." Under this statute it was held that an

action of libel (*Carson* v. *McFadden*, 10 Iowa 91) and an action for assault and battery did not abate: *McKinlay* v. *McGregor*, 10 Iowa 111. Subsequently in 1862, the legislature amended the foregoing section by adding the word "legal," making it read, "if from the *legal* nature of the case the cause of action can survive or continue." In *Shafer* v. *Grimes*, 23 Iowa 550; the question arose whether an action of seduction would survive under this statute and it was argued that, "legal nature of the case," meant if the action survived at common law, and as the action did not survive at common law it could not survive under the statute. But the court refused to so construe the statute. "This construction," said DILLON, C. J., "practically makes the section a *felo de se*. With this construction the section would mean simply this, 'actions do not abate by death, if at common law they survive;' of course they would not, and the section would be useless." The court held that this word was intended to refer to causes of action whose legal nature is such that they cannot survive, as for example, suits for divorce (*O'Hagan* v. *O'Hagan*, 4 Iowa 509); for dower (*Betts* v. *Matthews*, 4 Harr. 427); or for other rights necessarily dependent upon the existence of the person.

Effect of Appeals and Reversals—Practice.—The action only abates where a party dies before judgment: *Gibbs* v. *Belcher*, 30 Tex. 80; *Cox* v. *Whitfield*, 18 Ala. 738; *Taney* v. *Edwards*, 26 Tex. 224; *Long* v. *Hitchcock*, 3 Ohio 274; and therefore when judgment has been obtained on a cause of action which would not survive the death of a party, the judgment does not abate by reason of a subsequent death: Id. But an award of arbitrators is not a "judgment" within this rule, even where the statute provides that an award of arbitrators shall have the effect of a judgment, and be a lien on real estate: *Miller* v. *Umbehower*, 10 S. & R. 31.

Where a final judgment in a personal action is rendered against a defendant, and he sues out a writ of error, but dies before errors are assigned, the writ does not abate, but his administrator may prosecute it. "The proceeding," it is said, "becomes a new action. The defendant below becomes the actor here, and the original cause of action has become merged in the judgment to reverse which is the object of the present action. If then the judgment which is complained of as erroneous survives, the cause of action as to the writ of error survives:" *Cox* v. *Whitfield*, 18 Ala. 738; *contra*, *Long* v. *Hitchcock*, 3 Ohio 274. The rule is the same where the

plaintiff dies pending the appeal by the defendant, but after judgment against him: *Gibbs* v. *Belcher*, 30 Tex. 80, overruling *Taney* v. *Edwards*, 27 Id. 225; *Kimbrough* v. *Mitchell*, 1 Head. 539; *Thompson* v. *Central Railroad Co.*, 60 Ga. 120. But according to the American practice where a judgment in a personal action which does not survive is obtained before the death of the defendant who dies pending the appeal by him, if the judgment is reversed by the appellate court, the action abates: *Cox* v. *Whitfield*, 18 Ala. 738; *Harrison* v. *Moseley*, 31 Tex. 608; *Benjamin* v. *Smith*, 17 Wend. 208.

In England, when the plaintiff dies after verdict, the court, in granting a new trial on the application of the defendant, will impose terms on him to prevent his taking advantage of the plaintiff's death—as that the verdict if obtained again shall be entered as of the time when the case was first tried: *Griffith* v. *Williams*, 1 Cromp. & J. 47; *Palmer* v. *Cohen*, 2 B. & Ad. 966. This very just practice does not appear to be followed in this country. But it has been held in Massachusetts that where the death occurs after verdict, delay during the time taken for the argument of law questions on which its validity depends or for advisement thereon will not be allowed to deprive a party of its benefits, and where a party dies after verdict judgment will be entered *nunc pro tunc* as of the day of the verdict: *Kelley* v. *Riley*, 106 Mass. 341; *Twycross* v. *Grant*, 27 W. R. 87. And the stipulation of counsel, as a condition of putting the case over a circuit, that in case of the death of the plaintiff before final judgment and determination of the action, the cause of action should survive, will be enforced by the court: *Ames* v. *Webbers*, 10 Wend. 576; s. c. 11 Id. 186. And such a stipulation will continue in force until final judgment, although, in the meanwhile a verdict and judgment in the plaintiff's favor had been set aside on appeal: *Cox* v. *New York, &c., Railroad Co.*, 63 N. Y. 414. Under the New York Code death after *verdict* does not cause the action to abate: *Wood* v. *Phillips*, 11 Abb. Pr. (N. S.) 1; though before this statute a personal action did not survive if a party died before final judgment: *More* v. *Bennett*, 65 Barb. 338; *Ireland* v. *Champneys*, 4 Taunt. 885.

Both natural death and civil death (*i. e.* imprisonment in the penitentiary for life) abate actions for personal injury: *Freeman* v. *Frank*, 10 Abb. Pr. 371.

The question whether a cause of action survives may be raised

by demurrer (*Leggate* v. *Moulton*, 115 Mass. 552), or by plea in abatement, or the death may be taken advantage of at the trial without a plea: *Baltimore, &c., Railroad Co.* v. *Ritchie*, 31 Md. 191. An answer by a defendant, setting up that he is dead, is inconsistent, for the fact that he has put in an answer proves that he is alive; such an answer therefore is bad on demurrer: *Freeman* v. *Frank*, 10 Abb. Pr. 370.

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RECENT AMERICAN DECISIONS.

Supreme Court of Illinois.

BARCLAY v. SMITH.

A certificate of membership in a corporation formed for the purpose of maintaining a commercial exchange, and from which the member derives no pecuniary profit, but only the advantage resulting from the right to transact business in its rooms, is not property which is liable to be subjected by creditor's bill to the payment of the member's debts.

A creditor's bill was filed to subject a certificate of membership in the Chicago Board of Trade to the member's debts and to restrain him from transferring it. It appeared that the certificate was transferable to any person eligible to membership who might be approved by the directors and that it had a market value of $4000, but that it did not entitle the member to any pecuniary profit or dividend, but only to the commercial advantage resulting from his position and privileges as a member of the corporation: *Held* (reversing the judgment of the court below, reported 21 Am. Law Reg. 408), that the bill could not be sustained.

APPEAL from the First District.

This was a creditor's bill, filed in the Supreme Court of Cook county, against the debtor and the Board of Trade of Chicago for discovery as to the nature and value of the debtor's certificate of membership in the board, and for an injunction to restrain the transfer of such certificate. That court sustained the bill and entered a decree requiring the debtor to execute an assignment of the certificate to a receiver, and enjoining him from otherwise disposing of it. The opinion is fully reported in 21 Am. Law Reg. 408. This decree was affirmed by the appellate court of the First District, whereupon the present appeal was taken.

The opinion of the court was delivered by

CRAIG, J.—There is but one question presented by the record and that is whether a certificate of membership in the Board of Trade of the City of Chicago is property which is liable to be sub-